PP

lwn.

MARDANI HUSSIN

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL TRIAL NO: 45-23-2003]
26 SEPTEMBER 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Whether accused in possession with mens rea - Presumption under s. 37(da) of the Dangerous Drugs Act 1952 - Whether applicable - Whether accused failed to rebut presumption of trafficking - Whether prosecution had proven its case beyond a reasonable doubt - Whether prima facie case established*

The accused was charged with trafficking cannabis weighing 927 grams, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the Act. On 22 October 2002 at about 9pm, one Insp. Jaabar ('SP4') organised an ambush party at Jalan Raja Mahmud. The accused arrived on the scene at 9.30pm on a motorcycle and stopped in front of a house some 10 or 15 feet away from SP4. The police party immediately approached the accused and SP4 identified himself as the police and subsequently arrested the accused. The accused had by then alighted from his motorcycle and was holding in his right hand, a newspaper package, which upon inspection was found to contain a slab of cannabis wrapped in aluminium foil and a transparent plastic wrapper. The package and the accused were brought back to the police station where a police report was made and markings on the exhibits were done by SP4. The following afternoon, the exhibits and the accused were handed over to the investigating officer ('SP6'). The exhibits were sent to Jabatan Kimia, Petaling Jaya for analysis and the chemist ('SP2') found it to be cannabis defined under s. 2 of the Dangerous Drugs Act. In his defence, the accused chose one of general denial and submitted that on the said night, he was at a friend's (Roy) shop, a fellow Indonesian. The accused submitted that Roy had asked him to return his friend's (Mohd Nor) motorcycle to his house and the accused had agreed to the request. According to the accused, when he reached his destination *ie*, house number 50 and before he could alight from the motorcycle, he was apprehended by the police. The accused denied that he was arrested with a package in his right hand and further denied that SP4 had shown him the contents of the newspaper package.

Held (convicting and sentencing the accused):

[1] From the facts, the court was satisfied that the prosecution had succeeded in proving a *prima facie* case. The accused was caught red handed, holding the package containing cannabis. He was seen coming into Jalan Raja Mahmud on a motorcycle and was immediately apprehended when he alighted the motorcycle a mere 10 or 15 feet away from SP4. Obviously the accused had carried and transported with him that package containing the cannabis. (p 499 a)

[2] The maximum evaluation of the prosecution evidence showed that the accused knew why he had transported this large quantity of cannabis and what he was actually holding when he was arrested. The common sense approach of Lord Diplock as termed by the court of appeal in *Mohd Yazri Minhat v. PP* brought this court to the conclusion that accused was in possession of the said cannabis in the sense that he knew the nature of the drugs he possessed, was aware of it and had a power of disposal over it and indeed intended to transfer it to someone. In other words, he was in possession with *mens rea* of that cannabis *(Toh Su Kuan v. PP).* (pp 499 g-h & 500 a-b)

[3] The presumption under s. 37(da) of the Act was now applicable since the weight of cannabis in the accused's possession was way beyond the 200 grams fixed by that section. The uncontroverted direct evidence that the accused was in possession of the said cannabis and the statutory presumption now operative against him had thus brought this court to a finding of a *prima facie* case against the accused. (p 501 a-b)

[4] The accused had not, during the prosecution's case, put across his defence that he was present in front of house number 50, merely to run an errand for Roy *ie,* to return Mohd Nor's motorcycle. These two names had not been mentioned earlier by the defence. Further there was no protest by the accused on his arrest. He had also not explained to the arresting officer why he was there and what he was doing with the motorcycle which he claimed to belong to Mohd Nor. To now raise this in his defence was too late. His story was nothing more than a mere afterthought which this court found to be unbelievable. (p 502 d-f)

[5] The court rejected the accused's explanation that he was not aware of the package that he had transported. There was no reason for this court to now doubt the version related by SP4 on how the accused was arrested carrying that package in his right hand. There was no suggestion that SP4 had made up this story and no reason for the court to suspect that the accused had been fixed up by the police. This defence thus was nothing more than a bare denial. (p 503 c-d)

[6] The court had appraised the evidence of the accused, including his demeanour and evaluated it in relation to the account related by the prosecution's witness, notably that of SP4 and one Sjn Karim ('SP5'). There were serious differences and discrepancies in the accused's story as compared to that as narrated by SP4. There was an irreconcilable conflict as regards the issue whether the accused was carrying the package of cannabis at the point of his arrest. The court had earlier accepted SP4's recount of this incidence, which was not seriously challenged and had found SP4 to be telling the truth. This material difference in the accused's story amounted to a material discrepancy which affected his credit as a witness. Thus, the accused's explanation on this issue was totally rejected by the court. (p 503 e-f)

[7] The accused had failed, on a balance of probabilities, to rebut the presumption of trafficking applicable against him. His explanation could not be accepted as having successfully discharged the evidential burden required of him, to raise a reasonable doubt on the prosecution's case. Hence, the court found that the prosecution had proven its case beyond a reasonable doubt. (p 503 g & 504 b)

[The accused was convicted on the charge and sentenced to death according to s. 39B(2) of the Act and s. 277 of the Criminal Procedure Code.]

Case(s) referred to:
Mohd Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Msimanga Lesaly v. PP ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), (2)

For the prosecution - Mohamad Abazafree Mohd Abbas (Afifuddin Hafifi DPP with him)
For the accused - Ameenuddin Mohd Ibrahim; M/s Harbajan, Ameenuddin & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong J:

The accused person is charged as follows:

> Bahawa kamu pada 22 Oktober 2002, lebih kurang jam 9.30 malam di Jalan Raja Mahmud, Kampung Baru, Dang Wangi, Wilayah Persekutuan, Kuala Lumpur, telah mengedar dadah berbahaya iaitu 927 gram cannabis. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The facts are plain, and may be shortly stated thus. On 22 October 2002 at about 9pm upon information received, SP4, C. Insp. Jabbar, organised an ambush party and waited at Jalan Raja Mahmud. He divided his ambush party into two groups, the first which consisted of him, Sub Inspector Khabri Dollah (SP5), Sjn. Karirn, and Kpl. Jaafar, waited near a lamp post and the other group across the road (see 'K1' and 'K2' on the sketch plan exh. P13).

About 9.30pm, the accused arrived at the scene on a motorcycle bearing number WJY 9620, from the opposite direction from where SP4 and his group was waiting in observation. The accused then crossed the road and stopped in front of house No. 50, some 10 or 15 feet away from SP4. That police party immediately approached the accused. SP4 identified himself as the police, and arrested the accused. The accused had by then alighted from his motorcycle and was holding, in his right hand, a newspaper package, which upon inspection was found to contain a slab of cannabis wrapped in aluminium foil and a transparent plastic wrapper. One corner of the slab had been cut exposing its content. The accused looked stunned and frightened upon being confronted by SP4. The package and the accused were brought back to the police station where a police report was made and markings on the exhibits were done by SP4. The following afternoon the exhibits and the accused were handed over to SP6, the investigating officer. SP6 took immediate action on the exhibits and packed them to be sent to Jabatan Kimia, Petaling Jaya, for analysis. The chemist who analysed the exhibit, SP2, found it to be cannabis as defined under s. 2 of the Dangerous Drugs Act. Her analysis was not challenged by the defence. The cannabis was found to be 927 grammes in weight. There was no dispute as to the weight of the drugs and the method of analysis by SP2.

From the above facts, I was satisfied that the prosecution had succeeded in proving a *prima facie* case. The accused was caught red handed, so to speak, holding the package containing cannabis. He was seen coming into Jalan Raja Mahmud on a motorcycle and was immediately apprehended when he alighted the motorcycle a mere 10 to 15 feet away from SP4. Obviously the accused had carried and transported with him that package containing the cannabis. This posed the question why the accused perpetrated this act.

In *Mohd. Yazri Minhat v. PP* [2003] 2 CLJ 65, the Court of Appeal had referred to and adopted the approach taken by the Privy Council in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, where, *inter alia*, Lord Diplock had expressed the following view on the act of transporting and its purpose, a large quantity of dangerous drugs. His Lordship said:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption **the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible** – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act. (emphasis added)
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence need to rebut it.

Although the purpose of transporting is not an essential ingredient of an offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA), I had relied on the above quoted dictum as a logical guide in determining knowledge which is an element requiring proof, on the part of the accused. In the circumstances I am satisfied on a maximum evaluation of the evidence and on good sense inference, that the accused knew why he had transported this large quantity of cannabis and what he was actually holding when he was arrested. It can also lead to an irresistible inference that in transporting and then carrying that large quantity of cannabis, the accused was intending to part with its possession to someone else (see *Msimanga Lesaly v. PP* [2005] 1 CLJ 398) and not merely for passive possession. His expression of shock and fear when confronted by the police is corroborative of the fact that he

had this knowledge. This common sense approach of Lord Diplock's as termed by the Court of Appeal in *Mohd. Yazri*'s case brought me to the conclusion that the accused was in possession of the said cannabis in the sense that he knew the nature of the drugs he possessed, was aware of it and had a power of disposal over it and indeed intended to transfer it to someone, in other words he was in possession with *mens rea* of that cannabis (see *Toh Su Kuan v. PP* [2005] 3 CLJ 740). The cannabis slab of which the accused was in control and custody, was loosely wrapped in a newspaper which could be easily opened. The slab had a cut at one of its corners, exposing the dried leaf materials inside. It could be easily seen if one were to open the newspaper wrapping. This, together with the large amount of cannabis involved may bring this court to draw an inference of possession against the accused. As was stated by Taylor J in *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28:

> the inference to be drawn from control and custody, depend in part, on whether the quantity is suggestive of trafficking or of individual consumption.

In this case, there was no suggestion by the defence that the cannabis found in the accused's possession was for his personal consumption.

As for knowledge, it is trite law that this may be inferred from the circumstances of each case. It is incumbent upon this court therefore to consider the various surrounding factors such as from where the drugs was found, how it was recovered, the reaction of the accused on being accosted by the police, the manner it was kept, the weight of the drugs recovered etc. to come to an inference of knowledge (see *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264, Court of Appeal decision). Thomas J in *Tong Peng Hong v. PP* [1955] 21 MLJ 232 made a most pertinent remark on inferring knowledge when His Lordship said:

> If something is found for example in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it.

In *Leow Nghee Lim (supra)* it was also held that "the word possession implies some knowledge but not necessarily full and exact knowledge", Taylor J in that case went on to say that "How much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances".

The presumption under s. 37(da) DDA is now applicable since the weight of cannabis in the accused's possession was way beyond the 200 grammes fixed by that section. The uncontroverted direct evidence that the accused was in possession of the said cannabis and the statutory presumption now operative against him had thus brought this court to a finding of a *prima facie* case against the accused. He now must enter into his defence and answer this charge against him, for if he were to remain silent, this court will have no hesitation in convicting him on the strength of the prosecution evidence adduced thus far. (See *Looi Kow Chai v. PP* [2003] 2 MLJ 65; see also *Balachandran v. PP* [2005] 1 CLJ 85).

Defence

The accused chose to give evidence on oath. His defence was one of general denial, which in law is not a defence (see *PP v. Ling Tee Huah* [1982] 2 MLJ 324). He stated that on the night of 22 October 2002 he was at a friend's (Roy) shop. Roy was a fellow Indonesian who had a business selling cassettes and compact discs. While he was there, Roy asked him to return his friend's (Mohd. Nor) motorcycle to his house, also located in Kampung Baru. Mohd, Nor, whom the accused is acquainted with, lived some 300 meters from Roy's shop. The accused agreed to the request. When he went to the motorcycle he saw a shirt placed in the motorcycle rack, which was positioned in front of the rider seat. He did not see anything else in the rack. When he reached his destination, ie, house number 50 (confirming SP4's evidence), and before he could alight from the motorcycle, he was apprehended by the police. He said he felt scared when the police officer introduced himself because he was an illegal immigrant from Aceh, Indonesia. The accused denied that he was arrested with a package in his right hand. On being shown photograph P7D, ie, the scene of the arrest, the accused denied that that was the road on which he was arrested stating that, he was arrested on a road which had a gentle slope. He also denied that SP4 had shown him the content of the newspaper package.

In assessing this defence, I am firstly reminded by the words of Sharma J in *PP v. Saimin & Ors* [1971] MLJ 16 where the learned judge said:

> The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation on his part but on the positive affirmative evidence of his guilt given by the prosecution.

It is trite law that in a criminal trial, the legal burden of proving an accused guilty lies throughout the trial upon the prosecution. In the instant case however, this court had found the accused to be in possession of the cannabis as stated in the charge and upon the application of the statutory presumption by virtue of s. 37(da) of the DDA 1952 be now deemed to be trafficking that cannabis. That burden is now thus shifted upon the accused to negate the presumption of fact now found against him (see *PP v. Mohd Farid Mohd Sukis* [2002] 3 MLJ 401). In that case Augustine Paul J also held that the accused now has the onus to call material witnesses and an adverse inference may be drawn against him for that failure, where the onus, as in the instant case, had shifted by way of statutory presumption, on the accused to prove his case on a balance of probabilities.

In the instant case, it must be noted that the accused had not, during the prosecution's case put across his defence that he was present in front of house number 50, merely to run an errand for Roy, ie, to return Mohd. Nor's motorcycle. These two names had not been mentioned earlier by the defence. Further there was no protest by the accused on his arrest. He had also not explained to the arresting officer why he was there and what he was doing with the motorcycle which he claimed to belong to Mohd. Nor. Roy ran a business only 300 meters from where he was arrested. Surely he could have brought the police to Roy for an explanation if he was truly ignorant of the cannabis found in his possession. According to him Mohd Nor was in his house, at number 50, where he had stopped the motorcycle. Again he could have told the ponce to immediately contact Mohd Nor to verify his story about the motorcycle. None of this was done. To now raise this in his defence is in my view too late. His story is nothing more than a mere afterthought, which this court found to be unbelievable. The accused's failure to call Roy as his witness would also in the circumstances, be detrimental to his defence, to negate the presumption now operating against him. It is a rule of essential justice and fair play that the defence put forward its material case during cross examination of the prosecution witnesses and not to surprise the prosecution with a defence raised for the first time and asking this court to disbelieve the version earlier narrated by the prosecution witnesses (see *Alcontara a/l Ambrose Anthony v. PP* [1996] 1 CLJ 705. In *PP v. Lin Lian Chen* [1992] 4 CLJ it was said by Edgar Joseph Jr. SCJ:

> The defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

The legal position on this matter was neatly stated by Jeffrey Tan J in *PP v. Johar Mustafa* [2004] 5 CLJ at p. 230 where His Lordship stated:

> Therefore, it is most settled law that the failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony *(Wong Swee Chin)*, or "tantamount to accepting the truth of the witness's testimony" (*PP v. Mohd Amin bin Mohd Razali & Ors* [2002] 5 CLJ 281 per Zulkefli J), and that if the defence is sprung in court for the first time when the accused makes his defence or the prosecution is taken by surprise the accused runs the risk of his defence being branded a recent invention *(Lin Lian Chen)* and the weight to be accorded to his defence will be detracted *(Alcontara a/l Ambrose Anthony)*.

This court also rejected the accused's explanation that he was not aware of the package that he had transported. There is no reason for this court to now doubt the version related by SP4 on how the accused was arrested carrying that package in his right hand. There was no suggestion that SP4 had made up this story and no reason for this court to suspect that the accused had been fixed up by the police. This defence thus, is nothing more than a bare denial, and a cooked-up lie. Not only was it untrue, but found to be not probable by this court.

In making this finding this court had appraised the evidence of the accused, including his demeanour and evaluated it in relation to the account related by the prosecution's witnesses, notably that of SP4 and SP5. I had found serious differences and discrepancies in the accused's story as compared to that as narrated by SP4. There was an irreconcilable conflict as regards the issue whether the accused was carrying the package of cannabis at the point of his arrest. I had earlier accepted SP4 recount of this incidence, which it must be noted was not seriously challenged, and had found SP4 to be telling the truth. Now, this material difference in the accused's story would in my view amount to a material discrepancy which affected his credit as a witness. Thus, the accused's explanation on this issue was totally rejected by this court.

As such this court had found that the accused had failed, on balance of probabilities, to rebut the presumption of trafficking now applicable against him. His explanation could not be accepted as having successfully discharged the evidential burden now required of him, to raise a reasonable doubt on the prosecution's case. As was held by the Supreme Court in *Mohd Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ 169:

> Where the prosecution relies on available statutory presumption to prove one or more of the essential ingredients of the charge, the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier that the burden of casting a reasonable doubt but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

(see also *PP v. Yuvaraj* [1969] 2 MLJ 89).

For these reasons this court had found that the prosecution had proven its case beyond a reasonable doubt. The accused was convicted on the charge and sentenced to death according to s. 39B(2) of the DDA 1952 and s. 277 Criminal Procedure Code.